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Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Note by the Secretary-General

The Secretary-General has the honour to transmit to the Members of the General Assembly the report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, submitted pursuant to Human Rights Council resolutions 7/4 and 16/14.

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Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Summary

Export credit and investment insurance agencies, commonly known as export credit agencies, are collectively the principal source of public financing for foreign corporate involvement in large-scale industrial and infrastructure projects in developing countries and emerging economies. In recent years, export credit agencies have assumed an increasingly important role in the global economy, particularly in the context of the global financial crisis.

Nevertheless, many projects supported by export credit agencies have harmful environmental, social and human rights consequences and are not financially viable. Numerous reports have documented human rights violations arising from or associated with projects supported by export credit agencies, including forced displacement of local populations, violation of the rights of indigenous peoples, denial of access to basic services and environmental damage. In addition, export credit agencies tend to be secretive and often lack transparency and accountability in their funding decisions and operations.

The present report, submitted in accordance with Human Rights Council resolutions 7/4 and 16/14, aims to focus attention on the adverse impact of export credit agency-supported activities on sustainable development and the realization of human rights in the countries where such activities are undertaken. It also examines the contribution of export credits to the debt burdens of those countries.

The report calls upon States to address the negative impact of export credit agency-supported projects and makes some recommendations on measures to ensure that the activities of export credit agencies do not undermine the international human rights and other obligations of their home and host States and do not contribute to human rights violations.

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I. Introduction

1. Export credit and investment insurance agencies, generally known as export credit agencies, are collectively the largest source of public financing for foreign corporate involvement in large-scale industrial and infrastructure projects, particularly in the extractive industries sector, in developing countries.[1] In 2005, export credit agencies from the member countries of the Organization for Economic Cooperation and Development (OECD) provided $125 billion in credit, insurance, guarantee and interest support.[2] In 2007, export credit agencies collectively supported $1.4 trillion in trade and investment, equivalent to around 10 per cent of the world's total export trade.[3] It is estimated that the activities undertaken by export credit agencies exceed those of all multilateral development banks and overseas development agencies and that they directly finance one in every eight dollars of world trade.[4]

2. In recent years, export credit agencies have assumed an increasingly important role in the global economy, particularly in the context of the global financial crisis. In April 2009, the Group of 20, at its summit meeting in London, and OECD member countries pledged to provide extra support for export credits to help increase international trade flows.[5]

3. Nevertheless, a significant number of the projects supported by export credit agencies, particularly large dams, oil pipelines, greenhouse gas-emitting coal and nuclear power plants, chemical facilities, mining projects and forestry and plantation schemes, have severe environmental, social and human rights impacts.[6] Numerous reports have documented the adverse human rights impact of projects supported by export credit agencies, including forced displacement of local populations, State repression, violations of the rights of indigenous peoples, denial

[1] See Doug Norlen, Rory Cox, Miho Kim and Catriona Glazebrook, eds., *Unusual Suspects: Unearthing the Shadowy World of Export Credit Agencies* (Oakland, California, Pacific Environment, 2002), p. 1; Bruce Rich, "Exporting destruction", *The Environmental Forum*, September/October 2000; Malcolm Stephens, *The Changing Role of Export Credit Agencies* (Washington, D.C., International Monetary Fund, 1999), p. 63; Andrew M. Moravcsik, "Disciplining trade finance: the OECD export credit arrangement", *International Organization*, vol. 43, No. 1 (Winter 1989), p. 176; OECD, "Review of official export credit commitments to IDA-only countries (2001-2009)", p. 6, available from www.oecd.org/dataoecd/42/59/36945707.pdf.

[2] See www.oecd.org/dataoecd/30/35/37931024.pdf. See also Karyn Keenan, "Export credit agencies and the international law of human rights" (Halifax Initiative, 2008), p. 1.

[3] See Bruce Rich, *Foreclosing the Future: Coal, Climate and Public International Finance* (Environmental Defense Fund, 2009), p. 5, available from www.edf.org/documents/9593_coal-plants-report.pdf. See also Richard Wainwright, ed., *Exporting Destruction: Export Credits, Illegal Logging and Deforestation* (FERN, 2008), p. 7.

[4] Delio E. Gianturco, *Export Credit Agencies: The Unsung Giants of International Trade and Finance* (Westport, Connecticut, Quorum Books, 2001), p. 1.

[5] The final communiqué of the Group of 20 on the Global Plan for Recovery and Reform states that its leaders will ensure the availability of at least $250 billion over the next two years to support trade finance through the Group's export credit and investment agencies and through the multilateral development banks. See the Global Plan for Recovery and Reform, adopted by the leaders of the Group of 20 on 2 April 2009. Available from www.g20.org/Documents/ final-communique.pdf. See also the statement of OECD on the global financial crisis and export credits dated 22 April 2009. Available from www.oecd.org/dataoecd/51/22/42624233.pdf.

[6] Norlen et al., *Unusual Suspects* (see footnote 1), p. 1.

of access to basic services and environmental damage.[7] In addition, export credit agencies often do not have adequate safeguards and due diligence, lack transparency and have been implicated in corruption.

4. The present report, submitted in accordance with Human Rights Council resolutions 7/4 and 16/14, seeks to focus attention on the adverse impact of export credit agency-supported projects on sustainable development and the realization of human rights in the countries in which such projects are implemented. It also examines the contribution of export credits to the debt burden of developing countries.

II. Overview of export credit agencies

A. What is export credit?

5. The term "export credit" refers to an insurance, guarantee or financing arrangement that enables a foreign buyer of exported capital goods and/or services to defer payment over a period of time (short term, usually under two years; medium term, usually from two to five years; and long term, usually over five years).[8] Export credit is the main type of facility provided by an export credit agency.

B. What are export credit agencies?

6. Export credit agencies are public entities that provide Government-backed or subsidized loans, guarantees, credits and insurance to private corporations from their home country to support exports and foreign investments, particularly in developing countries and emerging markets. Most developed countries have at least one export credit agency, which is usually an official or quasi-official agency of their Government.[9]

7. Although export credit agencies take various organizational forms, they are usually backed by a Government and operate in accordance with a Government mandate. An export credit agency can be: (a) a Government department, as is the case in the United Kingdom of Great Britain and Northern Ireland (Export Credits Guarantee Department) and the United States of America (Export-Import Bank); (b) an autonomous corporation, owned by the Government and independently

[7] See Gabrielle Watson, ed., *Race to the Bottom, Take II: An Assessment of Sustainable Development Achievements of ECA-Supported Projects Two Years After OECD Common Approaches Rev. 6* (ECA Watch, 2003); Stephanie Fried and Titi Soentoro, eds., *A Brief Overview of Export Credit Agencies in the Asia-Pacific Region* (Mumbai, World Social Forum, 2004); Nicholas Hildyard, "Snouts in the trough: export credit agencies, corporate welfare and policy incoherence", Corner House Briefing Paper No. 14 (Corner House, 1999), available from www.thecornerhouse.org.uk/resource/snouts-trough; Keenan, "Export credit agencies and the international law of human rights", p. 1. See also the submission of Amnesty International on the review of the revised recommendation on common approaches on the environment and officially supported export credits in March 2010 (POL 30/002/2010), p. 1.

[8] See OECD, *Export Credit Financing Systems in OECD Member Countries and Non-member Economies: Introduction* (2008). Available from www.oecd-ilibrary.org.

[9] For information on export credit financing systems in OECD member and non-member countries, see www.oecd-ilibrary.org/trade/export-credit-financing-systems-in-oecd-member-countries-and-non-member-economies_17273870.

managed, as in Australia (Export Finance and Insurance Corporation), Belgium (Office national du ducroire/Nationale Delcrederedienst) and Canada (Export Development Canada); or (c) a private company acting as a Government agent or a private-public partnership (where key decisions and risks are taken by the Government, while the company provides the services and undertakes the initial risk analysis), such as those in France (Compagnie française d'assurance pour le commerce extérieur), Germany (Euler Hermes Kreditversicherungs) and the Netherlands (Atradius).[10] These forms are reflected in the funding arrangements: from the national budget, from special Government funds, from loans and capital from the Government or from shares or bonds.

8. Export credit agencies provide support to domestic companies in different ways. They provide loans (directly or through a commercial bank) to foreign buyers to purchase goods and services originating in the agency's home country, thus facilitating the export capacity of local corporations. Financial services offered by export credit agencies also take the form of guarantees for commercial loans and export credit insurance. To obtain a credit guarantee, exporters take out insurance with an export credit agency, which undertakes to pay the exporter should the importer default on payment. Export credit agencies' insurance also cover the losses emanating from political risks, such as nationalization or expropriation without compensation, confiscation of investments, restrictions on conversion of dividends and transfer of profits, currency instability, economic crisis or war. Through the provision of guarantees and insurance, export credit agencies back transactions that would normally be refused in the private market owing to the economic or political risk associated with them.

9. Export credit agencies offer financing at lower interest rates, premiums and fees than those offered by the private markets, and their support entails minor economic requirements and limited (or no) compliance with environmental, social and transparency standards, thus facilitating easier, riskier and faster financial transactions. Nevertheless, for borrowers in developing countries, export credit agency-backed loans still have higher interest rates than many provided by other official sources, such as development banks or agencies.[11]

10. Finally, most official lenders, such as the World Bank, the International Monetary Fund and other development agencies, ostensibly aim to promote local economic growth, development and/or poverty reduction, but most export credit agencies do not have a development mandate at all. Their singular purpose is to promote their own countries' exports or foreign investments.

III. Export credit agencies and sovereign debt

11. Export credit agency-related debt constitutes the largest component of developing country debt. According to the World Bank, export credit agencies' total exposure to developing countries had reached an estimated $500 billion by the end of 2000, one quarter of those countries' total long-term external debt.[12] A number of

[10] Keenan, "Export credit agencies and the international law of human rights" (see footnote 2), p. 2.

[11] Aaron Goldzimer, "Worse than the World Bank? Export credit agencies — the secret engine of globalization", *Backgrounder*, vol. 9, No. 1 (Winter 2003), p. 2.

[12] World Bank, *Global Development Finance: Financing the Poorest Countries* (Washington, D.C., 2002), p. 107.

countries owe more than 50 per cent of their total debt to export credit agencies. According to 2001 figures from OECD, for example, around 64 per cent of the debt of Nigeria and 42 per cent of the debt of the Democratic Republic of Congo were owed to export credit agencies.

12. There are various ways in which export credits can contribute to a country's sovereign debt. Export credit agencies can directly contribute to the sovereign debt burden when they lend to a Government or foreign public entity, or when they guarantee or insure commercial credits made available to a Government or public entity. If the debtor (the public entity) defaults on its payments to the export credit agency or to the creditor insured by the agency, the debt owed by the public entity becomes part of the country's sovereign debt.

13. Export credits may also generate sovereign debt indirectly through sovereign counterguarantees. These guarantees seek to reduce the risks of transactions between a private investor (an exporter or provider of services, often from a developed country) and a foreign private recipient (an importer or recipient of an investment or project, often from a developing country). The exporter takes up insurance with its home country's export credit agency for a transaction or project with considerable economic or political risk. In turn, the export credit agency requires a counterguarantee from the recipient's Government. In the event of default or failure of the project, the export credit agency pays the private company for its loss and seeks reimbursement for its costs from the developing country Government against its counterguarantee. If the Government is unable to pay the counterguarantee, the amount owed is added to the country's sovereign debt. The inherent financial or political risk of the transaction is thus transferred from the private investor to the taxpayers of the country of the private recipient.

14. Another way is when export credit agency projects involve Governments in large contingent liabilities even in circumstances where they do not borrow or guarantee a loan. Developing country Governments often have to offer extraordinarily generous terms to attract certain private investments such as those for power projects. The Government may have to sign a power purchase agreement guaranteeing the purchase of power at high dollar-denominated prices. Since such a purchase agreement is not a loan, it is not counted as debt, although it may have massive budgetary implications for the Government concerned.

15. Inevitably, export credit agency backing reduces the pressure on investors to exercise due diligence in assessing the risk of default or failure of a project. Irresponsible investing and export credit agency backing can therefore contribute to an increase in the debt of developing countries.

16. Governments that are unable to meet their debt obligations often need to reschedule their debt repayments in international forums, such as the Paris Club. For the least developed countries, export credit-related debt is often not included in negotiations on debt relief or cancellation. Currently, all export credit debt that is cancelled after debt rescheduling agreements in the Paris Club may be reported as official development assistance. Thus, the cancellation of export credit agency debts is often funded by official aid budgets. However, transactions that result in export credit debt do not necessarily serve development purposes; export credits typically support environmentally and socially harmful projects.

17. Civil society organizations have expressed concern that some of the debt emanating from export credit agency transactions with developing countries may be odious or illegitimate (see A/64/289) and should therefore be cancelled. The independent expert shares this concern and urges debtor countries to conduct transparent public audits of all export credit agency debt in order to ascertain its nature. In keeping with the principle of shared responsibility of creditors and debtors for preventing and resolving unsustainable debt situations, as underscored in the Monterrey Consensus of the International Conference on Financing for Development, he also calls upon the home States of export credit agencies to undertake transparent public audits of the lending portfolios of their agencies.

IV. Export credit agencies and human rights

A. Human rights obligations of export credit agencies

18. States bear primary responsibility for the realization of human rights. In this regard, they have three essential duties: to respect, protect and fulfil the human rights of individuals or groups within their territory or jurisdiction. The duty to protect entails taking measures to ensure at all times that third parties do not violate human rights. Thus, States must take appropriate steps to prevent, investigate, punish and redress human rights abuses by third parties through effective policies, legislation, regulation and adjudication (see A/HRC/17/31, annex, principle 1).

19. It is increasingly recognized that States' human rights obligations can extend beyond borders in certain circumstances. For example, the Committee on Economic, Social and Cultural Rights has underscored the legal obligations of States to respect economic, social and cultural rights beyond their jurisdiction and to avoid actions that have the effect of undermining them. In its general comment No. 14, the Committee has stated that to comply with their international obligations, States parties have to respect the enjoyment of the right to health in other countries and to prevent third parties from violating that right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law (E/C.12/2000/4, para. 39).[13] In a similar vein, the Human Rights Committee, in its general comment No. 31, has stated that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within its territory (CCPR/C/21/Rev.1/Add.13, para. 10).[14]

20. Thus, a State whose actions undermine human rights abroad or whose failure to regulate national actors results in violations in other countries is liable in respect of those violations.[15] In addition, under article 2.1 of the International Covenant on

[13] See also general comment No. 12 on the right to adequate food, paras. 36 and 37; and general comment No. 15 on the right to water, paras. 31-34.

[14] See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136.

[15] Some treaty bodies have urged States parties to take steps to prevent companies under their jurisdiction from committing abuses abroad. See, for example, general comment No. 19 of the Committee on Economic, Social and Cultural Rights on the right to social security (E/C.12/GC/19), para. 54, and the Concluding Observations of the Committee on the Elimination of Racial Discrimination on the fourth, fifth and sixth periodic reports of the United States (CERD/C/USA/CO/6).

Economic, Social and Cultural Rights, States have an obligation to provide international assistance and cooperation with a view to achieving progressively the realization of the rights elaborated in the Covenant.

21. While the State where an export credit agency-backed project is implemented bears primary responsibility for the protection of human rights of the local population, the agencies' home States are responsible for the regulation and supervision of the activities carried out by their national export credit agencies (whether owned, mandated or regulated by Government) that had an adverse effect on the enjoyment of human rights of the population of the host State. As stated by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, States should take steps to protect against human rights abuses by business enterprises that are owned or controlled by the State or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence (A/HRC/17/31, annex, principle 4).

22. However, Governments rarely exercise due diligence concerning the actions of their national export credit agencies. Indeed, the agencies' operational policies and the national laws establishing them typically never include references to human rights standards. Neither do export credit agencies have in place a clear policy on the prevention of human rights abuses or on due diligence to identify potential harmful effects of projects on human rights and to mitigate them. Many export credit agencies' home States also lack effective mechanisms to adjudicate claims of human rights abuses resulting from projects backed by such agencies.[16] Moreover, impact assessments of human rights violations of export credit agency-backed operations are rarely undertaken. In addition, all transactions and projects supported by export credit agencies are often protected by confidentiality provisions that prevent their publication among the population and the potentially affected communities, thus undermining the human rights principles of transparency and participation.

23. As explained above, export credit agency-supported activities can have serious consequences on a country's debt burden and sustainable development and, consequently, on the lives of people. States should therefore ensure that the projects that they support through their export credit agencies do not result in or contribute to human rights abuses. When a Government, directly or through its export credit agency, fails to exercise due diligence to protect human rights from the potentially harmful behaviour of non-State actors, it is in breach of its obligations under international human rights law.

24. For export credit agencies to operate with due diligence, they should carry out and publicize human rights impact assessments, in consultation with the potentially affected population, before deciding to support any project. They should also continue to conduct independent monitoring throughout the life of the project and

[16] In the United States, the Overseas Private Investment Corporation, which operates as an export credit agency, has established an Office of Accountability to assess and review complaints about the projects that it supports. The Office offers local communities, which may be materially, directly or adversely affected by a project, and project sponsors, a means of raising complaints, independently from the Corporation's operations. See www.opic.gov/doing-business/accountability.

reassess the human rights risks. To ensure that potential victims receive adequate attention and redress, export credit agencies should put in place an independent, fair and non-discriminatory grievance mechanism. National legislation establishing export credit agencies and their operational policies should also refer to human rights standards. Export credit agencies should assess all projects against human rights standards and establish clear due diligence requirements in their policies and contracts with clients.

25. Private corporations that are financially supported by export credit agencies also bear responsibility for the human rights impact of their activities. It is noteworthy in this regard that the Human Rights Council, in its resolution 8/7, underscores the responsibility of transnational corporations and other business enterprises to respect all human rights (see also Human Rights Council resolution 17/4). It is also notable that the Committee on Economic, Social and Cultural Rights has stressed that national and transnational private actors should pursue their activities within the framework of a code of conduct conducive to the respect of those rights (E/C.12/1999/5, para. 20).

26. Private corporations have a responsibility to the community to ensure that their activities do not violate human rights, either directly or through complicit association with abusers, and to seek to prevent or mitigate adverse human rights impacts (A/HRC/17/31, annex, principle 13). It is notable that the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises has stressed that, in addition to compliance with national laws, corporations have a basic responsibility to respect human rights, as this is the basic expectation that society has of business (see A/HRC/11/13).

27. Such responsibility requires a policy commitment to comply with human rights standards grounded in core international human rights instruments, specific human rights due diligence and the provision of grievance mechanisms to victims of human rights abuses. Corporate due diligence should entail a number of steps that companies must take to become aware of, prevent, mitigate and address adverse human rights impacts. To conduct their businesses with due diligence, companies must consider the context in which they operate; the impact of their activities, by conducting human rights impact assessments; and the behaviour of the relationships connected to those activities, to avoid complicity in human rights abuses (A/HRC/17/31, annex, principle 17). They should also engage with potentially affected communities through continuous consultation and the provision of information.

28. When abuses have already taken place, grievance mechanisms should be provided to the victims. The Special Representative has emphasized that access to remedies plays an important role in corporate responsibility to respect human rights. Corporations should establish grievance mechanisms such as hotlines for raising complaints, advisory services for victims and expert mediators.

B. Impact of export credit agency activities on human rights

29. Although it is difficult to obtain accurate information on export credit agency-backed projects owing to the secretive manner in which most of the agencies operate, numerous reports have documented the harmful impact of those projects on human rights. According to the reports, corporate activities supported by export credit agencies have on numerous occasions resulted in human rights violations,

such as harassment of ethnic minorities, occupation of indigenous land, forced evictions and resettlement, lack of compensation, destruction of rural livelihoods, violations of labour rights, threats to life and bodily integrity, increased militarization, State repression, exclusion of women from consultation, restrictions on freedom of expression and association, insufficient participation of and consultation with people affected by the project and restrictions on access to justice.[17]

C. Other concerns

30. The activities supported by export credit agencies have also given rise to concerns about the lack of transparency and accountability. Most such agencies have resisted calls by civil society organizations to publish information, claiming that they are exempt from transparency requirements owing to the commercial and international sensitivity of their activities and the confidentiality rule that protects them.

31. Although the availability of information on their operations varies from country to country, export credit agencies lag behind the transparency and accountability mechanisms of other public agencies. This undermines any attempts to ensure that the agencies provide responsible credit, behave with due diligence and respect human rights and environmental standards. Indeed, most of them are not obliged to disclose information about the potential adverse social and environmental impact of the projects that they support. Some agencies release the relevant information only after the transaction has been approved and subject to authorization from the client.

32. The lack of transparency and accountability of export credit agency operations puts home Governments and, indirectly, their taxpayers, at risk of complicity in supporting projects that may result in human rights violations, connivance with corrupt practices, involvement in the activities of unaccountable regimes and environmental degradation. As public or semi-public entities, export credit agencies have a responsibility to inform taxpayers of any such risks.

33. Reports by civil society organizations indicate that projects supported by export credit agencies are known to have been implicated in corruption cases. According to Transparency International, bribing foreign officials in order to secure contracts for their exports has become a widespread practice in industrialized countries.[18] The bribes are treated as commissions and are included in the contract value covered by the guarantee or in the indemnification of the exporter where insurances come into play.[18]

34. Export credit agency-backed projects are also known to have supported the activities of unaccountable regimes. For example, loans and guarantees were

[17] See, for instance, Watson, ed., *Race to the Bottom, Take 11* (see footnote 7) and Norlen et al., *Unusual Suspects* (see footnote 1).

[18] Dieter Frisch, "Export credit insurance and the fight against international corruption", Transparency International Working Paper (Transparency International, 1999). Available from www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=2366. On insufficient progress in tackling corporate involvement in bribery and corruption, see also Transparency International, *Transparency in Reporting on Anti-Corruption: A Report on Corporate Practices* (2009).

provided by the Export-Import Bank of the United States for the Bataan Nuclear Power Plant project during the Ferdinand Marcos regime in the Philippines. The German export credit agency provided insurance to support a deal with Indonesia, during the Suharto regime, to purchase and modernize German vessels, which were eventually used in internal armed conflict in Indonesia.[19] Similarly, the Export Credits Guarantee Department of the United Kingdom of Great Britain and Northern Ireland agreed to underwrite a guarantee on the sale of Hawk fighter jets to the Indonesian Air Force during the Suharto regime in 1993 and 1996. The jets were reported to have been used by the Indonesian military against villages in East Timor in 1999.[20]

35. The provision of export credit agency loans and guarantees for extractive industry projects such as logging, mining, gas or oil can take an enormous toll on the environment of the region where the project is implemented and on the lives of their communities. They risk creating environmental degradation; land, air and water pollution; destruction of habitats; greenhouse gas emissions, deforestation, desertification and soil degradation; long-term fossil fuel dependence; and ultimately, global climate change. In turn, these environmental changes may affect the health of the local population, increasing the risk of cancer, skin and pulmonary disease and other health-related problems. They may also affect people's access to sources of livelihood, reducing their food security, and result in the displacement of local communities, particularly of indigenous peoples, from their traditional homelands.

36. As stated above, export credit agencies play an important role in the global economy. This role entails an additional responsibility for agencies supporting projects in developing countries to conduct their businesses with transparency, accountability and due diligence and in strict compliance with internationally agreed standards on human rights and environmental issues. It is regrettable that as public finance bodies supporting projects in developing countries, most export credit agencies have no development mandate and their sole mission is to promote investments and exports of private corporations, often to the detriment of human rights and sustainable development in the countries where they support projects.[21]

37. As intimated in his report on his mission to Australia (A/HRC/17/37/Add.1), the independent expert fully supports the view that the absence of transparency requirements raises serious questions about the accountability of export credit agencies to the taxpayers of their home States and to citizens of the developing countries where they support projects. Loans underwritten by an export credit agency's home Government or guaranteed by the Governments of the countries where export credit agency-supported projects are being implemented are matters of public concern. It is therefore reasonable to expect a public body or a publicly funded body to abide by transparency requirements and operate with clear accountability mechanisms.

38. The independent expert is of the view that export credit agencies should be required to publicly disclose information concerning their activities, including

[19] See European Network on Debt and Development, "Skeletons in the cupboard: illegitimate debt claims of the G7" (2007).

[20] Hildyard, "Snouts in the trough" (see footnote 7).

[21] Jubilee Australia, *Risky Business: Shining a Spotlight on Australia's Export Credit Agency* (Sydney, Australia, 2009), p. 10.

project assessment, decision-making and implementation, and to undertake assessments of the human rights impact of their financing decisions, in addition to environmental and social impact assessments. Any limitations to the disclosure of information should be clearly and narrowly defined. This would allow export credit agencies to make responsible and informed decisions about the projects they support.

39. Besides the adoption of transparency and accountability mechanisms as part of agencies' policies and procedures, State entities such as national legislatures or national audit offices have a responsibility to undertake ongoing monitoring of the activities of export credit agencies to ensure that their activities do not undermine their country's foreign aid and development policies or their international human rights obligations. These human rights concerns require further investigation.

V. International regulation of export credit agency activities

40. Within OECD, export credit agencies are governed through the Arrangement on Officially Supported Export Credits. The Arrangement establishes a legal and financial framework for export credit provision, with the aim of bringing discipline and transparency to export credit operations. The Arrangement focuses mainly on such issues as minimum interest rates and down payments, standardized repayment schedules, common reporting procedures, maximum duration of credits and discipline and transparency in the use of tied aid.

41. In addition, the OECD Working Party on Export Credits and Credit Guarantees (Export Credit Group) provides a forum for the discussion of non-fiscal issues, such as corruption, environment and competition, the negotiation of non-binding common guiding principles and improved cooperation among competitors.

42. International cooperation on export credit policy is also undertaken by the International Union of Credit and Investment Insurers, known as the Berne Union. However, its role is limited to exchanging information on foreign buyers to reduce commercial risk. The Berne Union gathers together export credit agencies not only from OECD countries but also from some emerging economies. It also includes private entities providing export credits and investment insurance without a public mandate. The guiding principles of the Berne Union, which apply to all members, contain vague references to such issues as environmental sensitivity, combating of corruption and promotion of transparency.

43. Most OECD export credit agencies have adopted policies regarding the environmental and social impact of their activities. Such policies typically require environmental impact assessments.

44. In 2003, OECD adopted the Export Credit Group's recommendation on common approaches on environment and officially supported export credits, known as the Common Approaches. The Common Approaches require Governments and export credit agencies to review projects for their potential environmental impact and to evaluate them against international standards. After a review in June 2007, OECD updated the recommendation on the Common Approaches, calling for more public disclosure of information and increased exchange of information to promote a level playing field among agencies. The rules also require compliance with environmental standards in the host country, the screening and classification of

potential environmental impact and the carrying out of environmental impact assessments for projects with potential significant adverse environmental impact, as well as the screening of projects against the World Bank safeguard policies or, where appropriate, the International Finance Corporation performance standards.

45. However, the Common Approaches have a number of drawbacks. First, they are a non-binding recommendation. Second, they contain a derogation clause (article 13) that allows member export credit agencies, should they so decide, to opt out of applying any standards at all, provided they report and justify this to the Export Credit Group.[22] Third, the Common Approaches currently apply only to officially supported export credits with a repayment term of two years or more.

46. It is notable that the Common Approaches make no reference to human rights, which has prompted the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to recommend that the Common Approaches clearly acknowledge that human rights are a critical element in the social sustainability of enterprises and markets and explicitly recognize the export credit agencies' role in fostering corporate responsibility to respect human rights.[23] The Special Representative has further suggested that OECD consider building export credit agency capacity on human rights by establishing a human rights working group to develop tools suitable for export credit agencies in undertaking human rights due diligence and help build in knowledge base and competency.[23] In addition, Amnesty International has recommended that export credit agency-supported projects be assessed against international human rights standards in order to prevent projects from causing or contributing to human rights violations.[24] The independent expert fully supports these recommendations.

47. With regard to corruption, in 2000, the Export Credit Group issued an action statement on bribery and officially supported export credits, which was revised in 2006 and later converted into an OECD recommendation. The recommendation recognizes the role of export credit agencies in combating corruption and recommends appropriate measures to deter bribery in their international operations, including informing exporters requesting credit about the legal consequences of bribery, requesting a declaration that the exporters have not been engaged in bribery, requesting information on past corruption charges, requiring the disclosure of information on agents' fees and commissions, checking the record of potential clients on the debarment lists of international financial institutions and suspending a project where there is evidence of bribery.[25]

[22] Wainwright, ed., *Exporting Destruction* (see footnote 3), p. 12. See also http://www.oekb.at/en/export-services/transparency-compliance/environment/oecd-common-approaches/pages/default.aspx.

[23] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, "Engaging export credit agencies in respecting human rights", statement at the OECD Export Credit Group Common Approaches Meeting, Paris, 23 June 2010.

[24] See the submission of Amnesty International on the review of the revised recommendation on the common approaches (see footnote 7), p. 4.

[25] Wainwright, ed., *Exporting Destruction* (see footnote 3), p. 15.

48. Despite these limited efforts, the operations of export credit agencies continue to be largely unregulated at the global level, and standards on and regulation of transparency and environmental and human rights effects are largely insufficient.

VI. State responsibility for the wrongful acts of export credit agencies

49. As officially supported agencies, export credit agencies can be distinguished from purely private financial corporations. Whether Government-owned or Government-mandated, they perform their functions under national laws or regulations that prescribe their mandates. All export credit agencies carry out some transactions on their Government's behalf, with its support and under its control. This establishes a legal nexus between the State and the agency.[26] Private-public consortia of export credit agencies are also controlled by the State through the authorization, funding and regulation of their operations. As a consequence of this legal nexus, it can be argued that any violation of international law committed by an export credit agency triggers the responsibility of its home State and the wrongful act committed by the export credit agency will be attributable to that State.

50. To support this view, it is worth recalling that according to articles 4 and 5 of the International Law Commission's draft articles on Responsibility of States for internationally wrongful acts, the conduct of any organ of the State, whatever functions or position it holds, and of any non-State organ empowered by the law of that State to exercise certain Governmental authority and acting in that capacity in the particular instance will be attributable to that State under international law. Moreover, for the purposes of international responsibility and in line with the principle of unity of the State, the acts or omissions of any unit of the State can be regarded as an act of the State (A/56/10). This means that the wrongful actions and omissions of export credit agencies that are organs of the State are attributable to the State under the international law of State responsibility. Export credit agencies established as State agencies or Government departments are clearly public authorities, and as such the State bears responsibility for their actions. They are wholly owned by the State and operate under its control. Similarly, export credit agencies established as autonomous corporations owned by the State may be independently managed, but their activities are ultimately overseen by a Government department such as the ministry of trade or finance. Accordingly, this second category of export credit agencies may also be considered as being under State control. Although private companies or private-public consortia belonging to the third category possess more autonomy, the State retains some control over their operations through regulation, funding, approval of large disbursements, oversight or the establishment of standards and procedures. In many cases, ultimate decisions regarding the operations of private or public-private corporations require the approval of a ministry or ministerial committee. Overall, the implication of the State in the activities of export credit agencies is a common factor and cannot be taken too lightly.

[26] See Özgür Can and Sara L. Seck, "The legal obligations with respect to human rights and export credit agencies", paper prepared for ECA Watch, Halifax Initiative and ESCR-Net, July 2006. Available from www.halifaxinitiative.org/updir/ECAHRlegalFINAL.pdf.

51. In line with the law of State responsibility, Governments must ensure that national export credit agencies do not violate international legal obligations, including international human rights law. Where an export credit agency does not consider or take steps to mitigate the human rights impact of the projects of private companies they support, they risk triggering the responsibility of the State for violating international law obligations should abuses occur (A/HRC/17/31, annex, principle 4). States' duty under international law also requires them to ensure that their actions or those of their organs, including export credit agencies, do not cause harm to another State.

52. A State also bears international responsibility for complicity in the wrongful acts of another State if it had knowledge of the circumstances of the wrongful act (A/56/10, article 16). Accordingly, if an export credit agency supports the project of a corporation in a country that allows the corporation to operate in violation of international human rights law, the home State could be responsible for assisting the wrongful act of the host State.[27]

53. The commentary on part one, chapter II, of the draft articles stresses that a State may be responsible for the effects of the conduct of private parties if it failed to take necessary measures to prevent those effects (A/56/10). As mentioned above, under international human rights law, States have a duty to regulate the activities of third parties to protect against human rights abuses. Similarly, in the context of the responsibility of transnational corporate activities, States are under the obligation to protect against human rights abuses of home corporations in foreign countries.[28]

VII. Conclusions and recommendations

54. **Projects supported by export credit agencies can have an adverse impact on sustainable development and human rights in the countries in which they are implemented. Often, export credit agencies lack transparency and do not adequately incorporate environmental, social and human rights considerations into their funding decisions. Under the international law of State responsibility, officially supported export credit agencies are organs or agents of the home State, and their wrongful acts or omissions may be attributable to that State. As such, home States are under an obligation to regulate their activities. In addition, export credit agencies have a responsibility to respect human rights.**

55. **In order to ensure that export credit agency-supported activities do not undermine international human rights obligations, contribute to violations of human rights, hamper sustainable development in the countries in which they are being undertaken or contribute to the debt burdens of developing countries, the independent expert recommends that:**

(a) **States adopt measures to ensure that their export credit agencies adopt and implement stronger environmental and social safeguards that are consistent with international human rights standards;**

[27] See Keenan, "Export credit agencies and the international law of human rights" (see footnote 2), pp. 3-7. See also Can and Seck, "The legal obligations with respect to human rights and export credit agencies", pp. 4-8.

[28] See Keenan, "Export credit agencies and the international law of human rights", p. 10; Can and Seck, "The legal obligations with respect to human rights and export credit agencies", p. 12.

(b) States ensure that their export credit agencies improve transparency and accountability by implementing disclosure policies that require, inter alia, public disclosure of all information on the environmental, social, human rights and development impact of agency-supported transactions and that such information is made accessible to the affected communities;

(c) States take measures, including adopting legislation, to ensure that their export credit agencies do not support projects that cause or contribute to human rights violations, and in this regard, that they ensure that their export credit agencies discharge their obligation to respect human rights by adopting a human rights due diligence framework through which they can assess the actual and potential negative human rights impact and address risks effectively;

(d) States ensure access to effective national legal remedies for those affected by export credit agency-supported projects and exports, including the victims of human rights violations arising from export credit agency-supported activities;

(e) The implementation of the OECD Common Approaches in environmental, social and human rights screening policies of export credit agencies become mandatory;

(f) The international community adopt a moratorium on the repayment of current export credit agency debt for the poorest countries, much of which has been incurred for economically unproductive purposes, debtor countries conduct transparent public audits of all export credit agency claims to determine their legitimacy in conformity with the odious debts doctrine, and all debt found to be contrary to the doctrine be unconditionally cancelled.